

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GARY L. DVORAK)	
Claimant)	
VS.)	
)	Docket No. 1,021,211
CARLSON TRUCKING, INC.)	
Respondent)	
AND)	
)	
CONTINENTAL WESTERN INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the December 29, 2008, Award entered by Administrative Law Judge Nelsonna Potts Barnes.¹ The Board heard oral argument on April 17, 2009, in Wichita, Kansas.

APPEARANCES

Randy S. Stalcup of Andover, Kansas, appeared for claimant. Douglas D. Johnson of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, at oral argument before the Board the parties stipulated claimant sustained a 15 percent whole person functional impairment due to his May 10, 2004, accident. Moreover, the parties stipulated at oral argument that claimant began his full-time employment with North Central-Flint Hills Area Agency on Aging on September 4, 2007.²

¹ The Award was signed by Administrative Law Judge Thomas Klein *for* Judge Barnes.

² R.H. Trans. at 32.

ISSUES

On May 10, 2004, claimant injured his back while working for respondent when he slipped and fell while carrying a box of frozen turkeys. In the December 29, 2008, Award, Judge Barnes determined claimant sustained a work disability³ under K.S.A. 44-510e of 57 percent, followed by a 47 percent work disability, followed by a 19.5 percent work disability. The Judge determined claimant sustained a 14 percent task loss and a 100 percent wage loss, followed by an 80 percent wage loss, followed by a 25 percent wage loss.

Respondent contends claimant's permanent partial disability should be limited to his 15 percent whole person functional impairment rating because he did not make a good faith effort to return to either teaching or a trucking job, both of which would have paid a comparable wage. In addition, although respondent did not raise this to the Judge, respondent now maintains claimant should receive 85 weeks (or \$34,698.70) of temporary total disability benefits for the period from May 10, 2004, until January 1, 2006, followed by 38.57 weeks (or \$12,586.16) of temporary partial disability benefits for the period from January 1 until September 28, 2006, when computing claimant's award.

Claimant also contends the Award should be modified. Claimant argues his post-injury average weekly wage is \$184, which claimant maintains is derived from averaging the money he has earned from 2005 through June 14, 2008. Consequently, claimant argues his permanent partial disability should be computed using a 70 percent wage loss.

The only issues before the Board on this appeal are:

1. What is the extent of claimant's permanent partial general disability and the amount of his award under K.S.A. 44-510e?
2. Does the Board have jurisdiction of the temporary total disability and temporary partial disability issues raised for the first time at oral argument before the Board?

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

³ A permanent partial general disability that is greater than the whole person functional impairment rating.

There is no dispute that on May 10, 2004, claimant fell and injured his back while carrying a box of frozen turkeys nor any dispute that claimant's accident arose out of and in the course of his employment. Likewise, there is no longer any dispute that claimant's average weekly wage for the date of accident is \$612.30.⁴

While undergoing medical treatment for his back injury claimant experienced some setbacks, which delayed his return to work. Following an epidural injection, claimant experienced a seizure. Thus, claimant was hospitalized and he commenced treatment for seizures. Later, claimant was hospitalized for bleeding ulcers related to some of his prescribed medications.

Claimant did not work anywhere after his May 10, 2004, accident through December 31, 2005. At the regular hearing and in its submission letter to the Judge, respondent represented that it had paid claimant 32 weeks of temporary total disability compensation. Claimant agreed that was the appropriate number of weeks of temporary total disability compensation.⁵

Encouraged by his doctors to return to work and start out on a part-time basis, claimant obtained part-time employment in January 2006 cooking for the North Central-Flint Hills Area Agency on Aging (Flint Hills). Claimant testified that in June 2006 he regained his driving privileges,⁶ which he presumably lost due to his seizures. And when a full-time area supervisor position came open with Flint Hills, he applied for it sometime in 2007. Flint Hills selected claimant and on September 4, 2007, claimant began his new job as an area supervisor.

The exhibits introduced at the regular hearing indicate claimant earned the following wages in the following years:

2005	\$ 0
2006	6,388.35
2007	12,569.77
2008 (through 6/14)	11,830.40

Moreover, those exhibits show that for the period ending June 14, 2008, claimant was earning \$910 every two weeks working for Flint Hills.

⁴ Claimant's Brief at 2 (filed Mar. 11, 2009).

⁵ R.H. Trans. at 7.

⁶ R.H. Trans. at 34. Claimant also indicated in his regular hearing testimony that it was mid-2005 when he regained his driving privileges, but June 2006 seems more plausible.

Claimant's medical expert, Dr. Daniel D. Zimmerman, was the only doctor to testify in this claim. The doctor examined claimant in September 2006. Dr. Zimmerman, who is board-certified as an independent medical examiner, testified that claimant's May 2004 accident aggravated lumbar disc disease at both L4-5 and L5-S1 in the low back. The doctor rated claimant as having a 15 percent whole person functional impairment using the *AMA Guides*.⁷ In addition, the doctor found that claimant had lost the ability to perform 9 of 38, or 24 percent, of the nonduplicate tasks that claimant's labor market expert Jerry D. Hardin determined claimant did in the 15-year period before his accident.

According to Dr. Zimmerman, claimant should be able to lift 20 pounds occasionally and 10 pounds frequently but that he should avoid frequent flexing of the lumbar spine and bending, stooping, squatting, crawling, kneeling, and twisting at the lumbar level.

Claimant, who obtained a bachelor's degree in music education in 1976 and later completed six to nine hours towards a master's degree in special education, drove a truck for respondent. He left teaching in 1992 for better pay. His teaching certificate is not current. According to respondent's vocational rehabilitation expert, Steve Benjamin, in order for claimant to obtain a current teaching certificate he needed to complete eight college credit hours at the upper division or graduate level in a specific content area, obtain approval from his local school district of a development plan, be fingerprinted, and pay an application fee. Mr. Benjamin believed claimant could earn approximately \$680 per week if he returned to teaching.⁸

In July 2007, Mr. Benjamin contacted claimant to discuss with him the possibility of recertifying him for teaching or helping him find a nontouch truck driving job (no physical loading/unloading), which Mr. Benjamin felt would pay approximately \$600 per week. Claimant was interested in both of those potential opportunities. Indeed, claimant applied for admission to Fort Hays State University. But claimant had already applied for the full-time area supervisor position at Flint Hills when Mr. Benjamin contacted him in July 2007 and the day after claimant applied for admission to the university, Flint Hills offered claimant the area supervisor job.

Claimant accepted the position with Flint Hills, which gave him an immediate pay increase from approximately \$6,000 per year to approximately \$24,000 per year. Claimant advanced several reasons for declining the job assistance offered by Mr. Benjamin and, instead, opting for the Flint Hills job. First, the Flint Hills job provided an immediate

⁷ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

⁸ Claimant's labor market expert, Jerry D. Hardin, did not disagree that starting pay as a teacher in central and western Kansas was approximately \$680 per week.

increase in income. Second, claimant was not certain he could complete all of the required courses online. Third, he was not certain respondent would help with living expenses while he was at school. And fourth, there was a question in his mind of how much time the course work would take and whether he would be able to work while completing those courses.

The Board finds that claimant took the area supervisor position with Flint Hills in good faith. Claimant's concerns were valid. The Workers Compensation Act has been interpreted to require injured employees to make a good faith effort to find appropriate employment once they have recuperated from their injuries. And claimant has satisfied that burden.

CONCLUSIONS OF LAW

Because claimant's low back injury is not included in the schedule of K.S.A. 44-510d, his permanent partial general disability benefits are determined by the formula set forth in K.S.A. 44-510e. That statute provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*⁹ and *Copeland*.¹⁰ In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for

⁹ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

¹⁰ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wages should be based upon ability rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury.¹¹

If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .¹²

As indicated above, claimant made a good faith effort to find employment once he recovered from his May 2004 accident and the related problems. Consequently, claimant's actual post-injury wages are to be used for computing his permanent partial general disability benefits. The Board finds claimant had a 100 percent wage loss through December 31, 2005.

Claimant earned an average of \$122.85 per week ($\$6,388.35 \div 52$ weeks) in 2006 and \$241.73 ($\$12,569.77 \div 52$) in 2007.¹³ Moreover, as of September 4, 2007, claimant began earning \$910 every two weeks, or \$455 per week. Comparing those post-injury earnings to claimant's pre-injury average weekly wage of \$612.30, the Board finds claimant had an 80 percent wage loss during 2006; a 61 percent wage loss for the period from January 1, 2007, to September 4, 2007; and a 26 percent wage loss commencing that date.

Based upon the uncontradicted testimony of Dr. Zimmerman, the Board finds claimant has a 24 percent task loss. Averaging that task loss with claimant's various wage loss percentages yields the following permanent partial general disability percentages: 62 percent (100 percent wage loss and 24 percent task loss) for the period through December 31, 2005; 52 percent (80 percent wage loss and 24 percent task loss) for the

¹¹ An analysis of a worker's good faith effort to find appropriate employment after recovering from the work injury for purposes of the wage loss prong of K.S.A. 44-510e may no longer be applicable as the Kansas Supreme Court has recently held that statutes must be interpreted strictly and nothing should be read into the language of a statute as was done in *Foult and Copeland*. See *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007); and *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007). The Board, however, will continue to follow the *Foult and Copeland* line of cases until an appellate court decides that K.S.A. 44-510e(a) does not require the fact finder to impute a wage based upon a claimant's wage earning ability whenever a claimant fails to prove he or she made a good faith effort to find appropriate post-injury employment.

¹² *Copeland*, 24 Kan. App. 2d at 320.

¹³ The record does not contain sufficient information to determine claimant's average weekly wage for that period in 2007 before he began working full time for Flint Hills.

period from January 1, 2006, through December 31, 2006; 43 percent (61 percent wage loss and 24 percent task loss) for the period from January 1, 2007, to September 4, 2007; and 25 percent (26 percent wage loss and 24 percent task loss) commencing that date.

The Board rejects respondent's contention that claimant's award of temporary total disability benefits should be modified as claimant's entitlement to temporary total disability benefits was not an issue raised to the Judge. The parties, in essence, stipulated at the regular hearing that he was entitled to receive 32 weeks of temporary total disability benefits by reason of his accident. Neither party suggested otherwise at the regular hearing nor in their submission letters to the Judge. Consequently, as that was not an issue that had been raised, it was not addressed by the Judge.

The Workers Compensation Act is explicit that the Board's jurisdiction is limited to those issues presented to the administrative law judges. The Act reads, in part:

The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.¹⁴

Similarly, neither claimant nor respondent raised temporary partial disability benefits as an issue to be determined by the Judge. Furthermore, the record does not contain sufficient evidence to determine when claimant's status changed from being temporary to a permanent status. When Dr. Zimmerman examined claimant in late September 2006, the doctor found claimant had reached maximum medical improvement. The doctor was not asked his opinion of *when* claimant had reached that status.

To summarize, the issues of temporary total disability benefits and temporary partial disability benefits are issues that respondent attempts to raise for the first time on appeal. Accordingly, the Board lacks jurisdiction to review them. In addition, assuming the Board had jurisdiction to review those issues, the record lacks sufficient evidence for the Board to ascertain claimant's status for the periods in question.

In conclusion, the December 29, 2008, Award should be modified to reflect the following work disability percentages for the periods found above: 62 percent, followed by 52 percent, followed by 43 percent, followed by 25 percent.

¹⁴ K.S.A. 2008 Supp. 44-555c(a).

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁵ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the December 29, 2008, Award as follows:

Gary L. Dvorak is granted compensation from Carlson Trucking, Inc., and its insurance carrier for a May 10, 2004, accident and resulting disability. Based upon an average weekly wage of \$612.30, Mr. Dvorak is entitled to receive 32 weeks of temporary total disability benefits at \$408.22 per week, or \$13,063.04.

For the period ending December 31, 2005, Mr. Dvorak is entitled to receive 53.71 weeks of permanent partial general disability benefits at \$408.22 per week, or \$21,925.50, for a 62 percent permanent partial general disability.

For the period from January 1, 2006, through December 31, 2006, Mr. Dvorak is entitled to receive 52.14 weeks of permanent partial general disability benefits at \$408.22 per week, or \$21,284.59, for a 52 percent permanent partial general disability.

For the period from January 1, 2007, through September 3, 2007, Mr. Dvorak is entitled to receive 35.14 weeks of permanent partial general disability benefits at \$408.22 per week, or \$14,344.85, for a 43 percent permanent partial general disability.

Beginning September 4, 2007, Mr. Dvorak's permanent partial general disability decreases to 25 percent, leaving no additional permanent disability benefits due and owing due to the accelerated payout provisions of the Workers Compensation Act.¹⁶

Accordingly, Mr. Dvorak is entitled to a total award of \$70,617.98, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

¹⁵ K.S.A. 2008 Supp. 44-555c(k).

¹⁶ See *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

IT IS SO ORDERED.

Dated this ____ day of June, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Douglas D. Johnson, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge